1986

State of Utah v. John R. Remington: Brief of Respondent

Utah Supreme Court

David L. Wilkinson; Attorney General; David B. Thompson; Assistant Attorney General; Attorney for Plaintiff/Respondent.
Khris Harrold, Chris Kerecman; Attorneys for Defendant/Appellant.

IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH,	:	CASE NO. 860031
Plaintiff-Respondent,	:	
-v-	:	
JOHN R. REMINGTON,	:	Category No. 2
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM CONVICTIONS OF AGGRAVATED ROBBERY, A FIRST DEGREE FELONY, POSSESSION OF A DANGEROUS WEAPON BY A RESTRICTED PERSON, A SECOND DEGREE FELONY, AND A FINDING OF BEING A HABITUAL CRIMINAL, IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE J. DENNIS FREDERICK, JUDGE, PRESIDING.

DAVID L. WILKINSON
Attorney General
DAVID B. THOMPSON
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

KHRIS HARROLD
CHRIS KERECMAN
Salt Lake Legal Defender Assoc.
333 South Second East
Salt Lake City, Utah 84111

Attorneys for Appellant

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236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

KHRIS HARROLD
CHRIS KERECMAN
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333 South Second East
Salt Lake City, Utah 84111

Attorneys for Appellant

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BRIEF OF RESPONDENT

STATEMENT OF ISSUES PRESENTED ON APPEAL

The following issues are presented in this appeal:

1. Did defendant preserve for appeal the issue he raises regarding the trial court's refusal to give his requested eyewitness identification instruction?

2. Was there sufficient evidence to support defendant's conviction of aggravated robbery?

STATEMENT OF THE CASE

Defendant, John R. Remington, was charged with aggravated robbery, a first degree felony, under UTAH CODE ANN. § 76-6-302 (1978) (amended 1986), possession of a dangerous weapon by a restricted person, a second degree felony, under UTAH CODE ANN. § 76-10-503 (1978), and being a habitual criminal under UTAH CODE ANN. § 76-8-1002 (1978) (R. 20-21).

A jury found him guilty of the first two offenses (R. 104-05). In a separate proceeding, the court ruled that he was a habitual criminal (R. 130). The court then sentenced him to the Utah State Prison for consecutive sentences of five years to life, one to fifteen years, and five years to life for aggravated

robbery, possession of a dangerous weapon, and being a habitual criminal, with two one-year enhancements for use of a firearm (R. 130-35). It also ordered defendant to pay restitution in the amount of $5,240.54 (R. 134).

STATEMENT OF FACTS

The State presented the following relevant evidence at trial. On August 17, 1985 sometime between 2:00 and 2:30 p.m., defendant and a co-defendant, Stephen John Kalisz, arrived at a used car lot in Salt Lake City. After defendant spoke with the owner of the lot, defendant and Kalisz took a black 1978 Monte Carlo for a test-drive, leaving the truck that they had arrived in behind. When the car was not returned within the allotted time, the lot owner searched defendant's and Kalisz's truck and found a Utah State Prison pass bearing defendant's picture and name. After contacting the prison, he called the police (R. 164-69).

A police officer had only been at the car lot a short time when the Monte Carlo was returned by Kalisz at between 5:00 and 5:45 p.m. When questioned about defendant's whereabouts, Kalisz explained that he had taken defendant to the hospital because the latter had suffered an appendicitis attack. Before Kalisz returned, the police officer had received a radio dispatch which indicated that police were looking for a black Monte Carlo that had slammed into a curb while apparently fleeing from the scene of a robbery that had just occurred at the Brickyard Plaza shopping center in Salt Lake City. The officer and lot owner noticed a scuff mark (consistent with that caused by hitting a

curb) on the Monte Carlo driven by Kalisz and that the price stickers on the car appeared to have been removed and then replaced during the time that the car had been away. However, a search of the car uncovered no weapons or evidence of a robbery (R. 170-74, 275-79, 282, 296-97, 301-02).

Shortly before Kalisz returned to the car lot, a clerk in a jewelry store at Brickyard Plaza, Malinda Engelhardt, observed defendant in her store. He did not look at any of the merchandise, but merely stood and looked out the window. When defendant left, he walked in the direction of Cruser Jewelry which was a short distance away (R. 198-200, 210, 214).

Several minutes later, a man entered Cruser jewelry, pointed a gun at Reed Cruser (the store owner), forced him to lie down on the floor, swept jewelry and cash from display cases and a safe into a large plastic bag, and fled the scene. The robber was present for three to five minutes. Cruser recognized the man as a person who had been in the store earlier that day, but was able to view his face for only part of the time that he was in the store for the robbery (R. 224-28, 236-37, 264).

After receiving a report of the incident from Cruser, the police took him to the car lot where Kalisz was now in custody. There, Cruser indicated that he thought Kalisz, although dressed differently, was the robber.[1] However, when presented with a photo lineup several days later, Cruser selected

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[1] There is a discrepancy in the evidence on this point. Although Cruser testified that he was able to identify Kalisz, the accompanying police officer testified that Cruser could not make that identification (R. 283-84).

a picture of defendant (State's Exhibit #7) and identified him as the robber. Finally, at trial Cruser reaffirmed his belief that State's Exhibit #7 was a photograph of the man who robbed him, but made an in-court identification of Kalisz and further stated that he did not think defendant was the man[2] (R. 229, 236, 244-46, 257).

The police also showed Ms. Engelhardt the photo lineup. She positively identified State's Exhibit #7 as the person she had seen in her store the day of the robbery. At trial, she again identified defendant as that person (R. 202-04).

Upon his arrival back at the prison in the evening of August 17, defendant was arrested and a gold Bulova watch seized from his person. Although the watch did not have any identifying marks that conclusively connected it with Cruser Jewelry, it was identical to watches stolen from the store. However, it could not be established whether or not defendant had left the prison that day wearing such a watch (R. 230-35, 268-70, 304-06, 311-12).

SUMMARY OF ARGUMENT

Because defendant did not except to the trial court's refusal to give his requested eyewitness identification

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[2] At trial, the State's counsel and defense counsel did not always make perfectly clear which defendant they were referring to when asking witnesses to make identifications. However, it appears that in these instances Mr. Garcia was generally referring to his client, Kalisz, and Ms. Harrold to her client, defendant. As for the prosecutor, he appears to have distinguished between defendant and Kalisz by referring to their respective attorneys and asking the witness to identify the person sitting next to each attorney (presumably, defendant sat next to Ms. Harrold and Kalisz sat next to Mr. Garcia).

instruction, he is precluded from challenging that ruling on appeal.

Although the evidence presented by the State at trial was not overwhelming, under the relevant standards of review, this Court should hold that there was sufficient evidence to support defendant's conviction of aggravated robbery.

ARGUMENT

POINT I

DEFENDANT DID NOT EXCEPT TO THE TRIAL COURT'S REFUSAL TO GIVE HIS REQUESTED EYEWITNESS IDENTIFICATION INSTRUCTION; THEREFORE, HE WAIVED ANY OBJECTION TO THAT RULING FOR PURPOSES OF APPEAL.

At the close of trial, defendant requested a cautionary eyewitness identification instruction patterned after the one recommended in United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972) (R. 65-66). The trial court refused to give the instruction (R. 66). On appeal, defendant argues that this was reversible error. However, because the record does not contain an exception by defendant to the lower court's refusal to give the requested instruction, this Court should not address his assignment of error. As stated in State v. Evans, 668 P.2d 566 (Utah 1983):

> Generally, for a party to be in a position to complain of the trial court's failure to give an instruction, he must first propose the instruction and then take exception to the court's refusal to give it.

668 P.2d at 568 (citation omitted). See also State v. Noren, 704 P.2d 568, 571 (Utah 1985); Utah R. Crim. P. 19(c) (UTAH CODE ANN. § 77-35-19(c) (1982)). Nothing suggests that manifest injustice

would occur if the alleged instructional error is not reviewed by the Court due to waiver. Cf. State v. Lesley, 672 P.2d 79, 81 (Utah 1983).

POINT II

ALTHOUGH NOT OVERWHELMING, SUFFICIENT EVIDENCE WAS PRESENTED BY THE STATE TO SUPPORT DEFENDANT'S CONVICTION OF AGGRAVATED ROBBERY.

When considering a challenge to the sufficiency of the evidence, this Court has applied the following standard of review:

> This Court will not lightly overturn the findings of a jury. We must view the evidence properly presented at trial in the light most favorable to the jury's verdict, and will only interfere when the evidence is so lacking and insubstantial that a reasonable man could not possibly have reached a verdict beyond a reasonable doubt. We also view in a light most favorable to the jury's verdict those facts which can be reasonably inferred from the evidence presented to it.

State v. McCardell, 652 P.2d 942, 945 (Utah 1982) (citations omitted). As noted in State v. Booker, 709 P.2d 342 (Utah 1985):

> In reviewing the conviction, we do not substitute our judgment for that of the jury. "It is the exclusive function of the jury to weigh the evidence and to determine the credibility of the witnesses . . . ." State v. Lamm, Utah 606 P.2d 229, 231 (1980); accord State v. Linden, Utah 547 P.2d 1264, 1366 (1983). So long as there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made, our inquiry stops.

Id. at 345 (citation omitted). And, even if the Court views the evidence as less than wholly conclusive, or if contradictory evidence or conflicting inferences exist, the verdict should be

upheld. State v. Howell, 649 P.2d 91, 97 (Utah 1982). In short, "on conflicting evidence the Court is obliged to accept the version of the facts which supports the verdict." State v. Isaacson, 704 P.2d 555, 556 (Utah 1985) (citing State v. Howell, 649 P.2d at 93). Finally, circumstantial evidence alone may be competent to establish the guilt of the accused. State v. Clayton, 646 P.2d 723, 725 (Utah 1982).

Defendant does not dispute that an aggravated robbery occurred at Cruser Jewelry on August 17, 1985; he simply contends that the State's evidence was insufficient to prove beyond a reasonable doubt that he was the perpetrator of the crime. Although the evidence presented by the State at trial was not overwhelming, the jury still could have reasonably concluded that defendant was guilty of aggravated robbery.

The testimony of Ms. Engelhardt firmly placed defendant at the Brickyard Plaza shortly before the robbery at Cruser Jewelry. Although Mr. Cruser's identification testimony was inconsistent as it related to defendant, when shown a photo lineup several days after the incident he did indicate to the police that defendant was the robber.[3] The period of defendant's possession of the black Monte Carlo obtained from the used car lot -- the type of vehicle which was seen hurriedly leaving the scene of the crime -- coincided with the time the robbery was

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[3] Defendant's reference to Cruser's testimony at preliminary hearing should not be considered. No certified transcript of the preliminary hearing has been made a part of the record on appeal. Thus, this Court has nothing to review. See State v. Lairby, 699 P.2d 1187, 1192 (Utah 1984); State v. Wulffenstein, 647 P.2d 289, 293 (Utah 1982), cert. denied, 460 U.S. 1044 (1983).

committed. When Kalisz returned the Monte Carlo to the lot, he offered an explanation for defendant's absence that the jury could reasonably have concluded was false, given that defendant returned to the prison shortly thereafter (i.e., if defendant had actually suffered an appendicitis attack, it was not likely that he would have been released from the hospital that same day). That the price stickers on the car appeared to have been removed and replaced could have reasonably given rise to a jury inference that defendant had tampered with the stickers in order to make his vehicle less identifiable in the course of committing a robbery. Finally, a search of defendant upon his return to the prison uncovered a brand new watch identical to those stolen from the jewelry store. This evidence, although in many respects circumstantial, supports the jury's verdict.

CONCLUSION

Based upon the foregoing arguments, defendant's convictions should be affirmed.

RESPECTFULLY submitted this 4th day of February, 1987.

DAVID L. WILKINSON
Attorney General

David B. Thompson

DAVID B. THOMPSON
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Respondent were mailed, postage prepaid, to Khris Harrold and Chris Kerecman, Attorneys for Appellant, 333 South Second East, Salt Lake City, Utah 84111, this 4th day of February, 1987.

David B. Thompson